STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-553

May 3, 2004

CENTRAL MAINE POWER COMPANY
Request for Adjudicatory Proceeding
Regarding Dig Safe Recommended Decisions

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

We conclude that paragraph D of the administrative penalty provisions of the Dig Safe law, 23 M.R.S.A. § 3360-A (6-C), does not authorize the Commission to impose a penalty for the failure of an underground facility operator to mark its facilities within the statutorily-required tolerances. The Commission may only impose penalties for marking outside the tolerances pursuant to paragraph E of subsection 6-C which authorizes penalties for the marking of facilities in a negligent or reckless manner.

II. BACKGROUND

On July 24, 2003, Central Maine Power Company (CMP) filed a request for an adjudicatory proceeding regarding several Recommended Decisions issued by a Commission Damage Prevention Investigator. In those Decisions, the Investigator concluded that CMP had violated several provisions of the Dig Safe Law, 23 M.R.S.A. § 3360-A, and the Commission's Dig Safe Rule, Chapter 895, and assessed a monetary penalty totaling $8,500.

Among other positions, CMP had argued before the Investigator that, as a general matter, a utility should not be found in violation or assessed a monetary penalty if it made a good faith effort to comply with the requirements for locating its underground facilities. In particular, CMP argued that the use locating devices is not perfect and that it would be unreasonable to penalize a company when it takes all reasonable precautions and makes a good faith effort to locate its facilities. The Investigator agreed that some degree of imprecision can be expected in locating underground facilities, but that the Dig Safe statutes specify the acceptable degree of imprecision through stated tolerances. Moreover, the Investigator, while agreeing that locating equipment may not provide accurate results in some instances, noted that locating devices are only one source of information and that facility records should be a primary source for the location of underground facilities.

Pursuant to section 7 of Chapter 895, CMP may request a de novo adjudicatory hearing before the Commission if a Damage Prevention Investigator issues a

recommended decision adverse to the Company. Accordingly, the Commission indicated that it would conduct such a hearing as requested by CMP.

A case conference was held on September 18, 2003. CMP, the Commission's prosecutorial staff (Staff), and On Target Locating Services (On Target)[1] attended the conference. During the conference, it was agreed that the Commission would first address an initial issue of statutory interpretation regarding certain provisions of the Dig Safe law related to underground facility operator violations that are subject to administrative penalty. After the resolution of the statutory interpretation issue, further procedures would be determined to resolve the remaining issues in this proceeding.

The statutory interpretation issue involves paragraphs (D) and (E) of 23 M.R.S.A. § 3360-A (6-C). These paragraphs authorize the Commission to impose administrative penalties for the following facility operator violations:

> D. Failure of an underground facility operator to mark the location of the operator's underground facilities within the time limits required by subsection 4;
>
> E. Marking by an underground facility operator of the location of an underground facility in a reckless or negligent manner.

The parties attending the conference, in a subsequent filing, articulated the threshold issue as follows:

> The initial issue of statutory interpretation is whether the statute authorizes the Commission to find a violation and assess an administrative penalty for inaccurately marked facilities if the marking was not performed in a reckless or negligent manner. In particular, the question posed is whether, under Subsection D, an operator may be subject to a finding of violation and an administrative penalty for failing to mark the location of its underground facilities within the 18-inch tolerance zone and as otherwise required in subsection 4 of Maine's underground facilities damage prevention law, or rather only for failing to mark within the time limits required in subsection 4.

The Commission invited comment from any interested person on the statutory interpretation issue presented in this proceeding. CMP, Staff, On Target, the Public

[1] On Target is an underground facility locating contractor. CMP and On Target are affiliated corporate entities.

Advocate, Northern Utilities, Inc. (Northern), and the FairPoint New England Telephone Companies (FairPoint Companies)[2] filed comments.

III. POSITIONS OF THE COMMENTERS

A Central Maine Power Company/On Target

CMP and On Target (CMP/OT) filed joint comments arguing that the plain language of section 3360-A (6-C), paragraphs D and E indicates that administrative penalties for mis-marked facilities can only be imposed if the marking was performed negligently or recklessly. According to CMP/OT, the Legislature enacted the two paragraphs to address two separate actions by facility operators: paragraph D authorizes the imposition of a penalty if the operator fails to act within the two-day deadline required by subsection 4; while subsection E, in contrast, authorizes penalties if an operator marks facilities in a negligent or reckless manner. CMP/OT point to the specific language in paragraph D stating that penalties may be imposed for failing to mark "within the time limits required by subsection 4." CMP/OT note that paragraph 4 contains a number of requirements in addition to the two-day time limit (such as the 3 foot tolerance zone and required marking methods), and argue that the Legislature used very specific language that refers only to the time limits in section 4. CMP/OT argue that, if the Legislature intended to incorporate all of the requirements of subsection 4 into subsection D, it could have done so through the use of broader language.

CMP/OT also argue that an interpretation of subsection D that allows an operator to be penalized for reasons other than violating the two-day deadline, such as failing to mark accurately, would render subsection E meaningless. According to CMP/OT, if an administrative penalty can be imposed under subsection D for mis-marking, then subsection E, which allows for penalties for negligent or reckless marking, would be superfluous. CMP/OT state that under the rules of statutory interpretation, statutory language should be construed so that provisions are not rendered meaningless. In addition, CMP/OT state that, even if the language is found to be ambiguous, Maine law requires it to be strictly construed because the statute is of a penal nature.

Finally, CMP/OT argue that public policy supports their interpretation because, if reasonable care were exercised, imposing a penalty would have no deterrent effect. CMP/OT explain that facility locating is not perfect and that marking errors may occur even if due care is exercised.

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[2] The FairPoint New England Telephone Companies are Northland Telephone Company of Maine, Sidney Telephone Company, China Telephone Company, Maine Telephone Company, and Standish Telephone Company.

B. Prosecutorial Staff

Staff interprets paragraph D to establish a violation for an operator's failure to mark the location of its underground facilities within the tolerances set out in subsection 4 (3 feet wide over the facility or 1 ½ feet on each side of the facility), as well as for failure to mark within the time limits set in subsection 4. Staff argues that the legislative history demonstrates that the Legislature intended that a statutory violation and administrative penalty attach to the accuracy and manner of marking, not just to timeliness. Staff states that in 1991, the Dig Safe law was amended to clarify the facility operator marking requirements and to introduce penalties for failure to mark in accordance with the statute. According to Staff, the language allowed for a penalty for failure to mark either accurately (within the tolerance zone) or within the specified time limit. In 1999, the Dig Safe law was amended to give the Commission enforcement authority. Staff argues that the 1999 amendment reorganized the penalty provision of the law into what is now subsection 6-C, but that it did not substantively change the provision to allow for a mis-marking penalty only upon negligent or reckless actions.

Staff also argues that logic supports its interpretation in that it would be reasonable to conclude that the Legislature would not have specified marking tolerances if they were of no consequence for failure to comply with the law. Staff states that a requirement to mark the location of facilities within some range of accuracy is critical to successful avoidance of those facilities during excavations. Additionally, Staff views it as nonsensical to accept marks outside the tolerance zone as meeting the requirement for timely marking in that timely, but inaccurate, marking of facilities does nothing to advance the public safety purpose of the Dig-Safe law. Staff supports its views by noting that statutes of other states in the region authorize a penalty for mis-marking.

Finally Staff argues that paragraph E is not redundant or superfluous. According to Staff, paragraph E creates a separate violation (and an additional corresponding penalty) for instances in which inadequate care and lack of due diligence is evident, and recognizes actions or inactions more egregious in nature from those captured by specific statutory violations.

C. Public Advocate

The Public Advocate concludes that no penalties were intended by the Legislature when an underground facility operator incorrectly marks the location, but has not acted in a reckless or negligent manner. The Public Advocate's position is based on the plain language of paragraph D that ties a violation only to time limits. In addition, the Public Advocate states that the existence of paragraph E reinforces the conclusion that paragraph D only applies to timing, because the alternative interpretation would render paragraph E meaningless. Finally, the Public Advocate claims that a review of the legislative history supports its view of the plain meaning of the statute. The Public Advocate indicates that the legislative document that evolved into the current law containing paragraph D and E would have initially allowed for the

imposition of penalties for any failure to mark the location as required by paragraph 4, but the law that was enacted changed the language to be more restrictive.

D. FairPoint New England Telephone Companies

The FairPoint Companies argue that paragraph D is clear on its face and only applies to marking within a time limit. According to the FairPoint Companies, paragraph E was intended as a "catchall" provision for marking violations which are not otherwise covered in subsection 6-C and that this "catchall" provision only applies to marking done in a reckless or negligent manner. Further, the FairPoint Companies state that the Dig Safe Law recognizes that, no matter how conscientious an operator is in locating, problems may arise where there is no one is at fault and no one should be penalized. Thus, according to the FairPoint Companies, the current Dig Safe law provides for an enforcement process that balances damage prevention needs with the needs of excavators and facility operators to undertake their businesses in a reasonable manner.

E. Northern Utilities

Northern states that the Dig Safe law provides the Commission with the authority to assess an administrative penalty for the inaccurate marking of underground facilities. Northern's view is that Maine's Dig Safe law was intended to mimic the Dig Safe law in Massachusetts that provides for administrative penalties for the failure to provide proper markings. Northern states that prior to the 1999 amendments to the Dig Safe law, penalties could be assessed both for inaccurate and untimely markings, and that the amendments were intended only to consolidate the penalty provisions, rather than restrict those activities that could be subject to penalty. Northern states that subsection 4 provides an obligation for operators to accurately mark their facilities and, given the important public safety nature of the statute, an interpretation that adopts a "reasoned attempt" standard is completely illogical. Northern argues that a plain reading of paragraph D can support its interpretation and thus the language is ambiguous. As such, it should be interpreted to be consistent with the purpose of the entire public safety statutory scheme. Northern also states that its interpretation is consistent with the provisions of the Commission's Dig Safe rule. Finally, Northern argues that the Dig Safe law is not penal and, thus, the strict construction rule does not apply. Rather, Northern asserts that the statute is remedial in nature and should therefore be liberally construed.

IV. DISCUSSION

A. Statutory Construction

The issue before us is one of statutory construction. Statutory construction is an exercise to determine legislative intent. In construing a statute, the Commission must first look to the plain language to determine its meaning. *State v. Bjorkaryd-Bradbury,* 2002 ME 44 ¶ 9, 792 A.2d 1082, 1084. The Commission may look

beyond the plain language and examine other indicia of legislative intent, such as legislative history, only if the statutory language is found to be ambiguous or if a plain reading would lead to absurd or illogical results. *Darling's v. Ford Motor Co.,* 2003 ME 21 ¶ 7, 817 A.2d 877, 879; *Town of Madison, Dept. of Elec. Works v. Public Utilities Comm'n,* 682 A.2d 231, 234 (Me. 1996). Statutory language is ambiguous if it is reasonably susceptible to different interpretations. *Competitive Energy Services v. Public Utilities Comm'n,* 2003 ME 12 ¶ 15, 818 A.2d 1039, 1046.

In addition, in construing a statute, the whole statutory scheme must be considered and interpreted to achieve a harmonious result. *State v. Burby,* 2003 ME 95 ¶ 4, 828 A.2d 796, 798. In doing so, statutory language must be interpreted to avoid a construction that renders terms meaningless or superfluous. *Stromberg-Carlson Corp. v. State Tax Assessor,* 2001 Me 11 ¶ 9, 765 A.2d 566, 569. Thus, the construction of one statutory provision may not render another provision unnecessary or without meaning or force if a reasonable alternative construction exists that does not have such a result. *Home Builders Ass'n of Maine v. Town of Eliot,* 2000 ME 82 ¶¶ 7-8, 750 A.2d 566, 570. Finally, statutory language must be construed in light of its subject matter, its overall purpose, and the consequences of particular interpretations. *Id.* ¶ 14, 750 A.2d at 571.

It is upon these rules of construction that we review the Dig Safe statutory provisions in an effort to discern the Legislature's intent regarding the penalty provisions.

B. Statutory Provisions

Subsection 6-C of Title 23, section 3360-A contains the penalties provisions of the Dig Safe law. The subsection specifies those violations for which the Commission may impose administrative penalties. Two of the paragraphs in subsection 6-C apply to underground facility operators and are relevant to the statutory construction issue presented in this proceeding. Paragraph D of the subsection contains the language that is disputed in this proceeding. The violation specified in paragraph D is as follows:

> D. Failure of an underground facility operator to mark the location of the operator's underground facilities within the time limits required by subsection 4

The violation contained in paragraph E is important to the analysis in this proceeding in that the interpretation of paragraph D must not render paragraph E meaningless if other reasonable interpretations exist that would not have such an effect. Paragraph E states:

> E. Marking by an underground facility operator of the location of an underground facility in a reckless or negligent manner

In addition, subsection 4 of section 3360-A is relevant in that it contains the legal obligations of underground facility operators and is referenced in paragraph D. Subsection 4 provides:

> An underground facility operator shall, upon receipt of the notice provided for in subsection 3-A, advise the excavator of the location and size of the operator's underground facilities . . . in the proposed excavation area by marking the location of the facilities with stakes, paint or by other identifiable markings. The marking must identify a strip of land not more than 3 feet wide directly over the facility or a strip of land extending not more than 1 ½ feet on each side of the underground facility and must indicate the depth of the underground facility, if known. The underground facility operator shall complete this marking no later than 2 full business days after the receipt of notice.

There appears to be no dispute in this proceeding that subsection 4 creates a legal obligation for underground facility operators to mark their facilities within the specified tolerances and that a failure to do so is a statutory violation. The question before us is whether subsection 6-C authorizes the Commission to penalize an operator for a violation of the subsection 4 requirement to mark within stated tolerances or only when the failure to mark within the tolerances occurs from marking in a negligent or reckless manner.

C. Review of Plain Language

As required by the rules of statutory construction, our first task is to examine the plain language of paragraph D to determine whether it reasonably reveals the Legislature's intent or whether the language is ambiguous. As mentioned above, statutory language is ambiguous if it is reasonably susceptible to differing interpretations in the context of the overall statutory scheme. For the reasons discussed below, we conclude that the language of paragraph D is ambiguous.

CMP/OT[3] argue that Paragraph D only authorizes the Commission to penalize a facility operator for failure to mark within the specified 2 business day period and does not authorize a penalty for failure to mark within the statutory tolerances. To support this interpretation, CMP/OT focus on the language "within the time limits required by section 4." Staff argues that paragraph D allows the Commission to penalize for failure to mark within the stated tolerances (as well as for failure to mark

[3] The FairPoint Companies and the Public Advocate made some of the same arguments as CMP/OT. For simplicity, the discussion section of this Order generally refers to the arguments of CMP/OT.

within the stated time frame) because the statute specifies the failure "to mark the location of the operator's underground facilities." According to Staff, an operator has not marked the location of its facilities if it has marked outside the statutory tolerances.

The statutory language could have been drafted to more clearly convey either interpretation. For example, the CMP/OT interpretation could have been more clearly conveyed if the language simply referred to the failure "to mark," rather than the failure "to mark the location of the operator's underground facilities." Conversely, the Staff's interpretation could have easily been conveyed if the paragraph concluded "as required by section 4," rather than the existing language that specifies "within the time limits required by section 4."

The overall purpose of the Dig Safe law is to establish requirements for facility operators and excavators so as to prevent personal injury and property damage that can result from contact with underground facilities. In light of the overall purpose of the Dig Safe law, the Legislature could have reasonably intended either of the proposed alternatives and the language could support either interpretation. Thus, we find that the language of paragraph D is reasonably susceptible to differing interpretations and is therefore ambiguous. Accordingly, we move on to the consideration of other indicia of legislative intent.

D. Indicia of Legislative Intent

Because a reading of the plain language of paragraph D does not reveal the Legislature's intent, we look to other indications that might lead to the proper statutory construction. In doing so, we examine the overall statutory scheme, the existence of paragraph E, the legislative history of the current penalty provisions, the Commission's Dig Safe rule, and Dig Safe provisions in other states.

1. Statutory Scheme

As discussed above, subsection 4 creates a statutory requirement that facility operators mark their facilities within the specified tolerances. Thus, the failure to mark within the tolerances constitutes a violation of statute. The fact that a statute is violated provides some indication that the administrative penalty provisions in subsection 6-C were intended to apply to any operator marking violation. As Staff argues, it is logical that there would be consequences for a violation of a fundamental aspect of the Dig Safe law. However, it is also the case that not every violation of a statute is subject to penalty and the Legislature could have reasonably determined that penalties would only be appropriate in the case of negligent or reckless behavior by the facility operator.

CMP/OT argue that is reasonable for the Legislature to have authorized a penalty only for negligent or reckless marking, because the imposition of a penalty when an operator has exercised reasonable care would serve no useful purpose and have no deterrent effect. We find the CMP/OT argument in this regard to

be unpersuasive. Under the CMP/OT logic, any penalty that does not include a requirement of negligent or reckless behavior would lack a rational basis. It is certainly not uncommon for statutory violation penalties to be authorized without a negligent or reckless behavior component. For example, in the current case, CMP/OT acknowledge that paragraph D authorizes a penalty for failure to mark within the specified time limits without the need to examine the operators due care. The CMP/OT argument regarding the failure to mark within the statutory tolerances would appear to apply with equal force to the failure to mark within the statutory time limit requirements and thus sheds little light on the issue in this case.

2. Existence of Paragraph E

CMP/OT argue that the existence of paragraph E supports its interpretation of paragraph D. In particular, CMP/OT claim that the Staff interpretation of paragraph D would render paragraph E meaningless in contradiction of the rules of statutory construction. According to CMP/OT, if paragraph D is interpreted to include all markings outside the tolerance zone, then there would be no need for paragraph E that specifies a violation for negligent or reckless marking. Staff counters that its interpretation does not render paragraph E meaningless because it provides for additional penalties if the operator not only failed to mark within the tolerances, but did so due to negligent or reckless behavior.

Although Staff's argument has some logic, it is more common to account for a violator's behavior in assessing penalties through the inclusion of mitigating and aggravating circumstances. [4] Thus, it would have been more typical for the Legislature to have specified a violation and indicated a higher penalty if the behavior was negligent or reckless than to have specified two separate violations (one for a violating the statute and one for violating the statute in a negligent or reckless manner). Thus, we conclude that the structure of subsection 6-C with separate violations specified in paragraphs D and E generally supports the CMP/OT interpretation.

3. Legislative History

We now turn to an examination of the legislative history of amendments to the Dig Safe law for indications of the Legislature's intent regarding paragraph D. The Dig Safe system was established by the Legislature in the early 1990s (although excavator notice and operator marking requirements had existed for many years). P.L. 1991 ch. 437. As it does today, subsection 4 of the 1991 law contained underground facility operator requirements in response to excavator notice.

[4] For example, the general penalty provisions and the slamming penalty provisions in Title 35-A both include "[t]he severity of the violation, including the intent of violator, the nature, circumstances, extent and gravity of any prohibited act" as considerations that the Commission must take into account when assessing an administrative penalty. 35-A M.R.S.A. §§ 1508-A (2), 7106(2)(A).

The 1991 law also contained a subsection 6-A, entitled "forfeitures." Paragraph B of the subsection read as follows:

> An underground facility operator who does not mark the location of the operator's underground facilities under subsection 4 is subject to a civil forfeiture of up to $1000 in addition to any other remedies or forfeitures provided by law or any liability for actual damages resulting from the operator's failure to mark those facilities.

Thus, it appears clear that the forfeitures provision of the 1991 Dig Safe law allowed for a penalty for both the failure to mark within the 2 day period and failure to mark within the stated tolerances included in subsection 4; marking in a negligent or reckless manner was not required for the imposition of a penalty.

The Dig Safe law was amended in 1999 to give the Commission the responsibility to enforce the law and assess penalties for violations. P.L. 1999 ch. 718. Those amendments repealed subsection 6-A and added new subsection 6-C entitled "penalties." New subsection 6-C contained the current paragraphs D and E. The change in language from the reference to "subsection 4" in the old subsection 6-A (B) to a reference to the "time limits required by subsection 4" in the current subsection 6-C (D), along with the addition of paragraph E to subsection 6-C, provides strong evidence of a legislative intent to change the actions for which facility operators may be penalized from any violation of the marking requirements of subsection 4 to a violation of only the time limits of subsection 4 and for negligent or reckless marking.[5]

However, we find the 1999 change in the statutory language alone not to be conclusive on the statutory interpretation issue. Such a change in the actions for which facility operators may be penalized represents a major alteration of the Dig Safe statutory scheme. It would be unusual for the Legislature to have intended such a major change without any indication in the legislative history that such a change was contemplated and understood. We can find no evidence in the legislative history of the 1999 amendments to the Dig Safe law (which were comprehensive and involved a great variety of changes) that reveals that the Legislature was aware of the significance of the language change and affirmatively intended to restrict those actions for which facility operators could be penalized. In particular, none of the legislative documents that were before the Legislature at the time that we were able to review mentioned or had any

[5] It is also instructive that the initial legislative document that became the 1999 amendments did not contain a provision regarding negligent or reckless marking and stated that "an underground facility operator who does not mark the location of the operator's underground facilities as required by subsection 4 commits a civil violation." L.D. 2427 (119th Legis. 1999). Thus, the original legislative document contemplated that penalties could be imposed for mis-marking without a requirement that the marking occur in a negligent or reckless manner.

indication that a significant change would be made in the circumstances for which operators could be penalized.

4. Dig Safe Rule

The Commission's Dig Safe rule (Chapter 895, § 8), adopted in 2000, explicitly allows for an administrative penalty for the failure of a facility operator to mark within the statutory tolerance zone. Northern states that, during the Commission's rulemaking, no party, including CMP, challenged the rule's penalty provisions, revealing a general understanding that the Legislature intended to authorize the Commission to impose penalties for mismarking. Northern also argues that the Legislature had the opportunity to correct the Commission's interpretation of the penalty provisions when it amended the Dig Safe law in 2001 and 2003. According to Northern, the Legislature's inaction in this regard is an indication that the statutory interpretation reflected in the Commission's Dig Safe rule is consistent with legislative intent. CMP/OT counter that a Commission rule cannot enlarge the Commission's statutory authority to impose penalties and, because the Legislature was not made aware of any error in the rules, its failure to take corrective action is of no consequence.

The apparent general acceptance by interested persons of the Commission's rulemaking provisions that allow for penalties for marking outside the tolerances provides some limited evidence that the interpretation reflected in the rule is consistent with the intent of the Dig Safe statute. The lack of debate on this matter during the Commission's 2000 rulemaking is also consistent with the lack of any discussion or indication in the legislative record of the 1999 Dig Safe amendments regarding the restriction of mismarking penalties to circumstances involving negligent or reckless activity. We do not, however, ascribe any significance to the Legislature's lack of action subsequent to the rulemaking to correct the penalty provision, because there is no indication that the Legislature was made aware of any debate or disagreement in this regard. *See, In re Spring Valley Development,* 300 A.2d 736, 742-743 (Me. 1973) (Legislature acquiesces in statutory interpretation when it is brought to its attention and no action is taken).

5. Dig Safe Laws in Other States

The Staff argues that a review of the Dig Safe laws in neighboring New England states supports that the Maine Legislature intended to authorize the Commission to impose penalties for failure to mark within the statutory tolerances. Staff states that Maine's law was patterned on those in other New England states, primarily Massachusetts, and these states' laws allow for penalties for markings that fall outside the stated tolerances.

It does appear that Dig Safe laws enacted in other states within the region allow for penalties for mismarking without the requirement of a finding of negligent or reckless activity. There is no indication in the legislative record of an intent to deviate from the basic approach used in other states. However, we cannot give

significant weight to laws in other states in that the statutory language differs in significant respects from that of the Maine law.

E. Penal Nature of Statutory Provisions

CMP/OT argue that Maine law requires that paragraph D be strictly construed because it imposes a penalty. Northern responds that the Dig Safe law is not penal and that its terms should be liberally construed. It is a well-established principle that "penal statutes" are to be construed strictly to prevent the creation of a criminal offense by inference or implication. *State v. Tarmey,* 2000 ME 23 ¶ 9, 755 A.2d 482, 484. The question presented is whether the administrative penalties in the Dig Safe law are "penal statutes" for purposes of the strict construction rule.

Northern relies on State and federal precedent for distinguishing between civil and criminal penalties to support its argument that the Dig Safe provisions are not penal statutes. This precedent looks first to whether the statute was intended to be a civil or criminal penalizing mechanism. If the intent was to create a civil penalty, the statutory scheme is then examined to determine whether it is so punitive either in purpose or effect as to transform what was intended to be a civil remedy into a criminal penalty. *Hudson v United States,* 522 U.S 93, 99-101 (1997); *State v. Haskell,* 2001 ME 154 ¶ 8, 784 A.2d 4, 8; *State v. Anton,* 463 A.2d 703, 706 (Me. 1983).

This so called "intent-effects" test has been used by appellate courts to conclude that statutes providing for monetary penalties are civil rather than criminal in nature. However, the civil/criminal analyses in these cases have generally been made with respect to such matters as the applicability of double jeopardy, jury trial and *ex post facto* requirements, rather than the question of strict construction. *See, e.g., Hudson* (applicability of double jeopardy bar after imposition of administrative penalties for banking regulation violations); *Haskell* (whether sex offender registration requirements are criminal for purposes of *ex post facto* requirements); *Anton* (whether there is a right to a jury trial for certain traffic infractions). We are not aware of any Maine Law Court decisions in which the "intent-effects" test has been used to determine whether a statute should be considered penal for purposes of the strict construction rule. Northern does cite to two cases in which the Maine Superior Court used the "intent-effects" test to determine that civil forfeitures and penalties were not penal for purposes of the strict construction rule. *Berta v. Albanese,* No. AP-02-11 (Me. Super. Ct. 2002) (forfeiture to teacher for failure of superintendent to notify of non-renewal of contract is civil, not punitive); *Reardon v. Dept. of Social Services,* No. AP-02-06 (Me. Super. Ct. 2002) (financial penalty for providing care services without license is civil, not punitive).

Contrary to the Superior Court decisions, the Law Court has concluded that civil statutes providing for monetary penalties or fortietures are penal for purposes of the strict construction rule. In particular, the Court in *State v Chittim,* 2001 ME ¶ 5, 775 A.2d 381, 382 stated that a statute providing for a traffic infraction fine is penal, thus requiring strict construction. *See also, Marquis v Farm Family Mut. Ins. Co.,* 628 A.2d 644, 651 (Me. 1993) (statute providing for payment by insurer of interest and attorney

fees for untimely payments is penal in nature and subject to strict construction); *State v. One Uzi Semi-Automatic 9mm Gun,* 589 A.2d 31, 34 (Me. 1991) (firearm forfeiture statute penal in nature and subject to strict construction). We find *Chittim* to be controlling on this point of law and, accordingly, conclude that the administrative penalty provisions in subsection 6-C of the Dig Safe law are penal for purposes of the strict construction rule.

F. Analysis and Decision

Upon consideration of all arguments presented, we conclude that paragraph D authorizes the Commission to impose an administrative penalty only for the failure of a facility operator to mark within the time limits specified in subsection 4. In arriving at this conclusion, we focus on the change in statutory language that occurred through the 1999 amendments to the Dig Safe statutes and the overall statutory scheme that resulted. As discussed above, prior to the 1999 amendments, the Dig Safe law clearly allowed for a penalty for failure to mark within the stated tolerances without a need to find negligent or reckless behavior. The change in language from failure to mark "under subsection 4" in the pre-1999 law to "within the time limits required by subsection 4" in the current law provides substantial evidence of a legislative intent to restrict the operation of paragraph D to noncompliance with the statutory time requirements. If the Legislature had intended to maintain the pre-1999 penalty structure, it could have easily obtained that result by simply referring to the "requirements of subsection 4" rather the "time limits" of the subsection.

In addition, the statutory structure resulting from the 1999 amendments provides strong support for the conclusion that paragraph D does not apply to markings outside the tolerances. The 1999 amendments added paragraph E that explicitly authorizes the Commission to impose penalties when an operator marks a facility in a negligent or reckless manner. The most logical interpretation of this statutory structure is that paragraph D was intended to address failures to mark within the stated time limits, while paragraph E was intended to address improper marking. The Legislature could have rationally determined that penalties be authorized for any failure to mark within the stated time limits, while limiting penalties for failures to mark within the stated tolerances to circumstances involving negligent or reckless activity. An interpretation that paragraph D authorizes penalties for any marking outside the tolerances would tend to render paragraph E superfluous, in that all circumstances covered by Paragraph E would also be subject to penalty under paragraph D. Although, as discussed above, it is conceivable that the Legislature intended to create a separate violation with a corresponding additional penalty for mismarkings that resulted from more egregious behavior (i.e., negligent or reckless activity), it would have been more common to have a single penalty offense for a particular action with activity such as negligent or reckless behavior constituting aggravating factors that could justify higher penalties.

Finally, we have concluded that subsection 6-C of the Dig Safe law is a penal statute requiring a strict construction. Although the considerations discussed above are not conclusive, the strict construction rule requires us to resolve ambiguities

in the statutory language and structure in favor of a narrow interpretation of the penalty provisions of the Dig Safe law. Accordingly, taking into account all relevant considerations including the relevant rules of statutory construction, we conclude that paragraph D of subsection 6-C does not authorize the Commission to impose penalties for marking outside the stated tolerances. Penalties for mismarking must be imposed pursuant to paragraph E of subsection 6-C, which requires that marking occur in a negligent or reckless manner.[6]

G. Further Proceedings

We direct the Hearing Examiner assigned to this proceeding to convene a conference of counsel for the purposes of determining further procedures for the resolution of the remaining issues in this proceeding.

Dated at Augusta, Maine, this 3rd day of May, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

[6] We are aware that it is common for underground facility operators to engage an outside facility locating contractor to satisfy their obligations under the Dig Safe statutes. Because the obligations of the Dig Safe statutes fall on the facility operator, the negligent or reckless activity of an outside locating contractor can be attributed to the responsible operator for purposes of paragraph E. This outcome is consistent with principles of agency law and necessary for the rationale application of the Dig Safe penalty provisions. If operators were not responsible for the activity of their contractor, there could be no penalty for any mismarking in situations in which an outside contractor is used, a result that would clearly be contrary to legislative intent.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.